CHEW SAM POH v. PP

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
TENGKU MAIMUN TUAN MAT JCA
ABDUL RAHMAN SEBLI JCA
[CRIMINAL APPEAL NO: P-05-147-05-2013]
16 JANUARY 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B – Trafficking – Conviction and sentence – Appeal against – Defence of no knowledge – Whether subject to presumption under s. 37(d) of Dangerous Drugs Act 1952 – Failure to rebut presumption of knowledge – Whether appellant deemed to have known nature of drugs – Whether trial judge rightly rejected claim of no knowledge – Prima facie case of trafficking – Whether established – Whether conviction and sentence affirmed*

CRIMINAL PROCEDURE: *Appeal – Conviction and sentence – Dangerous drugs – Trafficking – Defence of no knowledge – Whether subject to presumption under s. 37(d) of Dangerous Drugs Act 1952 – Failure to rebut presumption of knowledge – Whether appellant deemed to have known nature of drugs – Whether absence of knowledge proved on balance of probabilities – Prima facie case of trafficking – Whether established – Whether conviction and sentence affirmed – Dangerous Drugs Act 1952, ss. 37(d), 39B*

SP3 had led a police party to raid a house after receiving a tip off that a certain drug-related activities were taking place at the said house. When SP3 introduced himself to the appellant who was standing in front of the house, the appellant had run through the side door and locked the door. SP3 and his team had to kick the door open and enter the house and caught the appellant at the rear end of the house. A body check on the appellant led to the discovery of a bunch of keys from the right pocket of his trousers leading to a room on the first floor where several containers containing substances were found. The contents of the containers were later confirmed by chemists to be dangerous drugs ('drug exhibits'). Subsequently, the appellant was charged with five offences of trafficking in dangerous drugs under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA') read with s. 34 of the Penal Code. He was found guilty of the first charge, where he was sentenced to death and for the fifth charge, where he was sentenced to seven years and 10 strokes of the rotan after the charge was amended to an offence of possession under s. 12(2) of the DDA. His appeal against the conviction and sentence in respect of the first charge was dismissed by the Court of Appeal. He did not file any appeal against the conviction and sentence in respect of the fifth charge. The prosecution appealed against the order of acquittal of the appellant for the second, third and fourth charges *ie* for trafficking in (i) 42.43 gram of methamphetamine; (ii) 48.57 gram of ketamine and (iii) 6.21 gram of heroin and 1.21 gram of monoacetylmorphines. The trial judge found him guilty and sentenced him to death for each of the three charges. The appellant

A thus appealed against the said conviction and sentence. The issues that arose for determination were (i) that there was a doubt on the identity of the exhibits and that since the manner in which the evidence that was built up in respect of the fifth charge was questionable, the integrity of the exhibits in the present case under appeal must also be questionable; and (ii) that the
B trial judge had erred in finding the appellant guilty of the offences charged.

Held (dismissing appeal; affirming conviction and sentence)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) There was no appeal against the conviction in respect of the fifth charge.
C To allow such application would be to set a dangerous precedent. It would potentially open the floodgates for similar application in the future whereby an appellant could just collaterally attack the trial judge's decision without going through the prescribed appeal process. This was not a fit and proper case for the exercise of such discretionary power.
D Furthermore, it was unfair to the prosecution as the Deputy Public Prosecutor was taken by surprise as he was only made aware of the matter on the hearing date itself. (paras 22 & 23)

(2) The defence that was raised by the appellant was the defence of no knowledge *ie* that he was not even in 'possession' of the drugs. By
E adopting this line of defence, the appellant had chosen not to give any explanation to the chemist's testimony that the house was used as a clandestine drug processing laboratory. This must be taken to mean that the appellant had no answer to the inference drawn that the drugs were for the purpose of trafficking within the meaning of s. 2 of the DDA.
F The defence of no knowledge raised by the appellant was also subject to the presumption under s. 37(d) of the DDA. The presumption clearly applied as the drugs were found in the appellant's custody and under his control. He was therefore deemed to have known the nature of the drugs. (paras 30, 31 & 32)

G **(3)** Where the accused has a legal (and not merely evidential) burden to discharge, he does not discharge that burden by merely raising a reasonable doubt on the fact that he is presumed by law, in this case knowledge of the nature of the drugs. He must prove absence of knowledge on the balance of probabilities by admissible evidence. In the
H absence of such rebuttal evidence coming from the accused, there will be no material before the court for the trial judge to come to a finding that the fact presumed had been rebutted. (para 33)

(4) A careful examination of the appellant's defence revealed that it was a mere denial more than anything else *ie* when the prosecution's evidence
I showed that he was present when the drugs and drug-related utensils were discovered in the house, the appellant countered by saying that he was not present. The trial judge had clearly and rightly rejected the

appellant's claim that he had no knowledge of the drugs. The appellant had not rebutted the presumption of knowledge under s. 37(d) of the DDA. (para 42)

(5) On the issue of knowledge, the Court of Appeal, in finding that a *prima facie* case of trafficking had been established against the appellant, must have found that the witnesses called by the prosecution were credible witnesses. Knowledge had been proved against the appellant as their evidence, in particular SP3's evidence which pointed to the guilty conduct on the part of the appellant. More importantly, it was not for the prosecution to prove knowledge as it was presumed. (para 46)

(6) Since the appellant's defence of no knowledge was rejected by the trial judge *albeit* on the lower burden of raising a reasonable doubt, it must follow that the trafficking charges had been proved beyond reasonable doubt. Failure to rebut the presumption of knowledge must lead to a conviction as it left the appellant with no other defence to fall back on in rebuttal of the *prima facie* case of trafficking established against him at the close of the prosecution case. (para 48)

Per Tengku Maimun Tuan Mat JCA (concurring):

(1) In an appropriate case where there is direct evidence to prove custody, control and knowledge of the dangerous drugs, the trial judge may make a positive finding of possession independent of s. 37(d) of the DDA. And where the accused person was carrying, transporting or importing the dangerous drugs in large amounts, a positive finding of trafficking under s. 2 of the Act may be made independent of the presumption of trafficking under s. 37(da). Presumptions are but to aid the prosecution to prove its case. Where direct evidence is available, the presumptions need not be resorted to. In the instant appeal, the trial judge had found that the appellant had actual possession of the dangerous drugs. In light of the affirmative finding of possession against the appellant, the issue of rebutting the presumption of knowledge and possession under s. 37(d) of the Act by the appellant did not arise. (paras 4 & 8)

Bahasa Malaysia *Translation of Headnote*

SP3 telah mengetuai pihak polis untuk membuat serbuan ke atas sebuah rumah selepas menerima maklumat bahawa aktiviti berkaitan dadah dijalankan di dalam rumah tersebut. Apabila SP3 memperkenalkan dirinya kepada perayu yang sedang berdiri di depan rumah tersebut, perayu telah melarikan diri melalui satu pintu dan mengunci pintu. SP3 dan pasukannya telah menendang buka pintu tersebut dan memasuki rumah tersebut dan menangkap perayu yang berada di belakang rumah. Pemeriksaan badan perayu telah membawa kepada penemuan segugus kunci di dalam poket kanan seluar yang dipakai perayu yang membawa pasukan tersebut ke sebuah bilik di tingkat pertama di mana beberapa bekas yang mengandungi bahan

A dijumpai. Kandungan bekas-bekas itu kemudiannya disahkan oleh ahli kimia sebagai dadah berbahaya ('ekshibit dadah'). Seterusnya, perayu telah dipertuduh dengan lima pertuduhan pengedaran dadah berbahaya di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB') yang dibaca bersama-sama dengan s.34 Kanun Keseksaan. Perayu telah didapati bersalah atas
B pertuduhan pertama, di mana dia telah dijatuhkan hukuman mati dan untuk pertuduhan kelima, di mana dia dipenjarakan selama tujuh tahun dan sepuluh sebatan rotan selepas pertuduhan dipinda kepada pertuduhan milikan di bawah s. 12(2) ADB. Rayuan perayu terhadap sabitan dan hukuman berkenaan pertuduhan pertama telah ditolak oleh Mahkamah Rayuan.
C Perayu tidak memfailkan rayuan terhadap sabitan dan hukuman berkenaan pertuduhan kelima. Pihak pendakwaan merayu terhadap perintah pelepasan perayu bagi pertuduhan kedua, ketiga dan keempat iaitu untuk pengedaran (i) 42.43 gram methamphetamine; (ii) 48.57 gram ketamine dan (iii) 6.21 gram heroin dan 1.21 gram monoacetylmorphines. Hakim bicara mendapati
D bahawa perayu bersalah dan menjatuhkan hukuman mati bagi ketiga-tiga pertuduhan itu. Perayu oleh itu merayu terhadap sabitan dan hukuman tersebut. Isu-isu yang timbul untuk diputuskan adalah (i) sama ada terdapat keraguan mengenai identiti ekshibit-ekshibit dan oleh kerana cara bagaimana keterangan dibentuk berkenaan pertuduhan kelima adalah dipersoalkan, integriti ekshibit-ekshibit dalam kes ini di bawah rayuan adalah sepatutnya
E dipersoalkan juga; dan (ii) bahawa hakim bicara telah terkhilaf apabila mendapati perayu bersalah atas pertuduhan-pertuduhan itu.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

F **(1)** Tiada rayuan terhadap sabitan berkenaan pertuduhan kelima. Untuk membenarkan permohonan tersebut akan menetapkan satu contoh duluan yang berbahaya. Ia berpotensi membuka longgokan untuk permohonan seperti itu di masa hadapan di mana seorang perayu boleh mencabar keputusan hakim bicara tanpa melalui proses rayuan yang
G ditetapkan. Ini bukan kes yang layak dan sesuai untuk menjalankan kuasa budi bicara seperti itu. Selanjutnya, tidak adil bagi pihak pendakwaan kerana Timbalan Pendakwa Raya terkejut kerana dia hanya diberitahu berkenaan perkara itu pada tarikh perbicaraan itu.

(2) Pembelaan yang dibangkitkan oleh perayu adalah pembelaan tanpa
H pengetahuan iaitu bahawa dia tidak mempunyai 'milikan' ke atas dadah-dadah itu. Dengan menggunakan pembelaan ini, perayu telah memilih untuk tidak memberi penjelasan kepada testimoni ahli kimia bahawa rumah itu telah digunakan sebagai makmal pemprosesan dadah haram. Ini bermakna bahawa perayu tidak mempunyai jawapan kepada inferens
I yang disediakan bahawa dadah-dadah tersebut adalah diniatkan untuk diedar dalam maksud s. 2 ADB. Pembelaan tanpa pengetahuan yang dibangkitkan oleh perayu adalah tertakluk kepada anggapan di bawah

s. 37(d) ADB. Anggapan dengan jelasnya terguna pakai kepada dadah-dadah yang ditemui dalam jagaan dan kawalan perayu. Oleh itu, perayu dianggap telah mengetahui sifat dadah-dadah itu.

(3) Di mana tertuduh mempunyai beban undang-undang (dan beban yang bukan sekadar jelas), dia tidak melepaskan beban itu dengan hanya menimbulkan keraguan munasabah atas fakta bahawa dia dianggap oleh undang-undang, dalam kes ini pengetahuan berkenaan sifat dadah-dadah itu. Dia seharusnya membuktikan terdapat ketiadaan pengetahuan atas imbangan kebarangkalian oleh keterangan yang boleh diterima masuk. Jika tiada keterangan bantahan itu oleh tertuduh, tiada material di mahkamah untuk hakim bicara memutuskan penemuan bahawa fakta yang dianggap telah dipatahkan.

(4) Pemeriksaan teliti pembelaan perayu menunjukkan bahawa ia adalah penafian semata-mata iaitu apabila keterangan pihak pendakwaan menunjukkan bahawa dia hadir apabila dadah-dadah dan peralatan yang berkaitan dengan dadah-dadah itu ditemui dalam rumah tersebut, perayu telah membalas dengan menyatakan bahawa dia tidak hadir. Hakim bicara telah dengan jelasnya dan secara betul menolak tuntutan perayu bahawa dia tidak mempunyai pengetahuan berkenaan dadah-dadah itu. Perayu tidak mematahkan anggapan pengetahuan di bawah s.37(d) ADB.

(5) Atas isu pengetahuan, Mahkamah Rayuan, dalam memutuskan bahawa terdapat kes *prima facie* pengedaran telah dibuktikan terhadap perayu, telah mendapati bahawa saksi-saksi yang dipanggil oleh pihak pendakwaan adalah saksi-saksi yang boleh dipercayai. Pengetahuan telah dibuktikan terhadap perayu kerana keterangan mereka, khususnya keterangan SP3, yang menunjukkan bahawa terdapat kelakuan bersalah dari pihak perayu. Lebih penting lagi, ia bukanlah tanggungjawab pihak pendakwaan untuk membuktikan pengetahuan kerana ia telah menjadi anggapan.

(6) Oleh kerana pembelaan tanpa pengetahuan yang dimasukkan oleh perayu telah ditolak oleh hakim bicara walaupun berdasarkan beban membangkitkan keraguan munasabah yang lebih rendah, ia harus diikuti bahawa pertuduhan pengedaran telah dibuktikan melampaui keraguan munasabah. Kegagalan mematahkan anggapan pengetahuan harus membawa kepada sabitan kerana ia meninggalkan perayu tanpa pembelaan lain untuk mematahkan kes *prima facie* pengedaran yang dibuktikan terhadapnya pada akhir kes pendakwaan.

Oleh Tengku Maimun Tuan Mat HMR (menyetujui):

(1) Dalam kes bersesuaian di mana terdapat keterangan langsung untuk membuktikan jagaan, kawalan dan pengetahuan dadah berbahaya, hakim bicara mungkin boleh membuat dapatan positif milikan bebas daripada s. 37(d) ADB. Dan di mana pihak tertuduh membawa, mengangkut atau

mengimport dadah berbahaya dalam jumlah yang besar, dapatan positif pengedaran di bawah s. 2 Akta mungkin dibuat bebas daripada anggapan pengedaran di bawah s. 37(da). Anggapan hanyalah untuk membantu pihak pendakwaan membuktikan kes. Di mana terdapat keterangan langsung, anggapan tidak sepatutnya dibuat . Dalam rayuan ini, hakim bicara telah mendapati bahawa perayu mempunyai milikan sebenar ke atas dadah berbahaya itu. Berdasarkan penemuan afirmatif berkenaan milikan terhadap perayu, isu mematahkan anggapan pengetahuan dan milikan di bawah s. 37(d) Akta oleh perayu tidak timbul.

Case(s) referred to:
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Haryadi Dadeh v. PP [2000] 3 CLJ 553 FC ***(refd)***
Isidro Leonardo Quito Cruz v. PP [2013] 2 CLJ 1025 FC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ng Eng Kooi & Anor v. PP [1970] 1 LNS 86 FC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
PP v. Zulkifli Arshad [2010] 6 CLJ 121 FC ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(4)
Dangerous Drugs Act 1952, ss. 2, 12(2), 37A(1), 37(d), (da), 39B(2)
Penal Code, s. 34

For the appellant - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Muhamad Yasser Mohd Nasri; DPP

[Editor's note: Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-92-2008 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] My learned sister, Justice Aziah binti Ali and I have read the draft judgment of our learned brother Justice Abdul Rahman bin Sebli. We agree with the same except on the application of s. 37(d) of the Dangerous Drugs Act 1952 (the Act) as set out in paras. 24 until 34 of the draft judgment.

[2] Our view on s. 37(d) of the Act is that where there is direct evidence upon which the trial judge had made a positive finding of possession, it is not incumbent on the trial judge to invoke the application of s. 37(d) of the Act.

[3] *Muhammed Hassan v. PP* [1998] 2 CLJ 170 is the authority for the proposition that a presumed possession under s. 37(d) of the Act could not be based to invoke the presumption of trafficking under s. 37(da) thereof and

that to arrive at the presumption of trafficking under s. 37(da), an express affirmative finding of possession, based on evidence, is necessary. The ratio decidendi in *Muhammed Hassan* (*supra*) is clear. One cannot rely on the presumption of possession under s. 37(d) to invoke a further presumption of trafficking under s. 37(da) of the Act (see *Haryadi Dadeh v. PP* [2000] 3 CLJ 553). That was the position of the law prior to the coming into effect of section 37A of the Act on 15 February 2014 which allows for the application of double presumption.

[4] Whilst Muhammed bin Hassan prohibits the application of double presumption under s. 37(d) and (da) of the Act, that case, in our view, is not the authority to compel the automatic application of s. 37(d) of the Act. In an appropriate case where there is direct evidence to prove custody, control and knowledge of the dangerous drugs, the trial judge may make a positive finding of possession independent of s. 37(d). And where the accused person was carrying, transporting or importing the dangerous drugs in large amount, a positive finding of trafficking under s. 2 of the Act may be made independent of the presumption of trafficking under s. 37(da). Presumptions are, but to aid the prosecution to prove its case. Where direct evidence is available, the presumptions need not be resorted to.

[5] In *Isidro Leonardo Quito Cruz v. PP* [2013] 2 CLJ 1025; [2013] 2 MLJ 1, the Federal Court through Abdull Hamid Embong FCJ said:

> [23] ... A person who is found to be in control and custody of dangerous drugs is deemed to be in possession if the presumption under s. 37(d) is invoked and to have known the nature of such drug (s. 37(d) DDA). Alternatively, once the prosecution has succeeded in proving by direct evidence and thus, on a finding of fact, that a person is in possession of a certain amount of dangerous drugs as listed under s. 37(da), he is in law presumed to be trafficking in that said drug, albeit without any intention for its distribution or consumption.
>
> [24] In this case, there was indisputable and direct evidence that the appellant was in possession of the said drugs in question. He even admitted to swallowing them. The learned trial judge made a positive finding that he was in possession of the drugs. We think that the learned judge had no other option in the face of this damaging evidence. At the end of the trial, it was the learned trial judge's finding that the appellant had failed to rebut the statutory presumption under s. 37(da)(ix) now triggered against him, on a balance of probability.
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> [25] Also by the very definition of trafficking under section 2 DDA, the appellant had been proven as a fact, to have trafficked in the said drugs by way of importing them into Malaysia. That act alone implies that he had trafficked in the said drugs, regardless of whether he had achieved the purpose of that act of importation. ...

[6] In *Siew Yoke Keong v. PP* [2013] 4 CLJ 149; [2013] 3 MLJ 630, the Federal Court affirmed the conviction and sentence for trafficking of dangerous drugs. Ahmad Haji Maarop FCJ stated that:

> [37] ... The learned trial judge was right when he held that the prosecution had proved actual possession of the proscribed drugs against Siew. Having made the affirmative finding of possession, and as the amount of dangerous drugs in this case was more than 15 grams, the learned trial judge invoked (and in our view rightly) the presumption of trafficking under section 37(da) of the DDA. In our judgment, the learned trial judge was right in calling upon Siew to enter on his defence on the charge of trafficking against him.

[7] The application of s. 37(d) had been made clear by the Federal Court in *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 where Richard Malanjum FCJ (as he then was) said at p. 605:

> [14] Hence, under the Act there is no mandatory rule to require for the invocation of s. 37(d) to establish the element of possession on a charge for trafficking of dangerous drug. Where the facts and circumstances warrant, it would be sufficient to establish actual possession cum knowledge from the totality of the evidence adduced.

[8] Coming back to the instant appeal, the learned trial judge had found that the appellant had actual possession of the dangerous drugs. In the light of the affirmative finding of possession against the appellant and guided by the decisions of the Federal Court cited above, we are of the view that the issue of rebutting the presumption of knowledge and possession under s. 37(d) of the Act by the appellant did not arise.

Abdul Rahman Sebli JCA:

[9] In the High Court the appellant together with two others were charged with five offences of trafficking in dangerous drugs under s. 39B(2) of the Dangerous Drugs Act 1952 ('the DDA') read with s. 34 of the Penal Code. He was found guilty of the first and fifth charges. For the first charge he was sentenced to death and for the fifth charge he was sentenced to seven years and ten strokes of the rotan after the charge was amended by the learned trial judge to an offence of possession under s. 12(2) of the DDA. His appeal against conviction and sentence in respect of the first charge was dismissed by the Court of Appeal on 23 January 2013. He did not file any appeal against his conviction and sentence in respect of the fifth charge.

[10] As for the second, third and fourth charges they were all acquitted and discharged of the trafficking charges at the close of the prosecution case without their defence being called. The learned trial judge found that the prosecution failed to establish a *prima facie* case against any of them. The Public Prosecutor appealed to the Court of Appeal against the order of acquittal but only against the acquittal of the appellant and not against the acquittal of the other two accused. The appeal was successful whereupon the appellant was ordered to enter his defence on the original trafficking charges.

[11] When the case came up for resumption of hearing in the High Court, the learned trial judge found it necessary to amend the charges by taking out s. 34 of the Penal Code (common intention) from the charges presumably because the acquittal of the other two accused had rendered the element of common intention otiose. For convenience we shall refer to the three amended charges (second, third and fourth charges in the court below) as the first, second and third charges. They read as follows:

First Charge

> Bahawa kamu pada 18.6.2008 jam lebih kurang 10.30 malam, bertempat di alamat 260D, Leboh Carnarvon, Georgetown, di dalam Daerah Timur Laut, di dalam negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu Methamphetamine seberat 43.23 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Second Charge

> Bahawa kamu pada 18.6.2008 jam lebih kurang 10.30 malam, bertempat di alamat 260D, Leboh Carnarvon, Georgetown, di dalam Daerah Timur Laut, di dalam negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu Ketamine seberat 48.57 gram, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Third Charge

> Bahawa kamu pada 18.6.2008 jam lebih kurang 10.30 malam, bertempat di alamat 260D, Leboh Carnarvon, Georgetown, di dalam Daerah Timur Laut, di dalam negeri Pulau Pinang, telah memperedarkan dadah berbahaya sejumlah berat 7.42 gram (Heroin seberat 6.21 gram) dan Monoacetylmorphines seberat 1.21 gram), dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[12] By ordering for the defence to be called, it must be taken that the Court of Appeal had found as a matter of law that a *prima facie* case of trafficking had been established against the appellant in respect of all three charges. Thus the issue of whether a *prima facie* case of trafficking had been established by the prosecution does not arise in this appeal. Any attack on any infirmity in the prosecution's evidence must in the circumstances be considered in this light. In any event this court being a court of co-ordinate jurisdiction has no jurisdiction to reverse the earlier decision of the Court of Appeal. Only the Federal Court can revisit the issue of *prima facie* case in the event of an appeal.

A **[13]** As for the facts of the case, the evidence for the prosecution is as follows. On 18 June 2008 at about 10.30pm the complainant Chief Inspector Lim Wei Yih (SP3) led a police party to raid house number 260D, Leboh Carnarvon, Georgetown Penang after receiving a tip off that drug related activities were taking place at the house.

B **[14]** On their arrival at the house, SP3 saw the appellant standing in front of the house. When SP3 introduced himself as a policeman the appellant ran into the house through the side door and quickly locked the door. SP3 and three of his men had to kick the door open to enter the house. As the raiding party entered the house, the appellant ran towards the rear of the house but C was caught by SP3 with the help of another officer. At the same time the two other accused were also arrested by other members of the raiding party. They were trying to open the back door when they were apprehended.

[15] A body check on the appellant led to the discovery of a bunch of keys from his right trousers pocket. Using one of the keys, SP3 opened the wooden D door of the living room. When the door was opened, there was a staircase leading to the first floor of the house. SP3 walked up the stairs and as he reached the first floor, there was a corridor leading to two other rooms. The door to the first room was locked using a padlock. SP3 opened the padlock using another key from the same bunch of keys and entered the room. Inside E the room SP3 found several containers containing substances suspected to be drugs. SP3 then locked the room while waiting for the Investigating Officer (IO) to arrive.

[16] After the arrival of the IO the exhibits including the drug exhibits were marked by SP3 and brought to the district police headquarters together with F the three arrestees. The drug exhibits were later sent to the chemist for analysis and were confirmed to contain morphine weighing 59.39g, methamphetamine weighing 43.23g, ketamine weighing 48.57g, a mixture of heroin and monoacetylmorphines (6.21g of heroin and 1.21g of monoacetylmorphines) and cannabis weighing 53.17g. Except for the G cannabis weighing 53.17g, these are the drug exhibits that formed the subject matter of the three charges against the appellant.

[17] Based on the equipment, the utensils and the substances found in the house, the chemist (SP1) was of the opinion that the house was being used as a clandestine drug processing laboratory ("makmal haram bagi memproses H dadah"). This activity falls within the definition of trafficking under s. 2 of the DDA. An inference can thus be drawn that the drugs were meant for that purpose.

[18] When called upon to state his defence the appellant chose to give evidence under oath. After hearing his explanation as supported by the I testimony of his wife (SD2) the learned trial judge found him guilty and sentenced him to death for each of the three charges. This is his appeal against the conviction and sentence.

[19] Before us Tuan Haji Hisham Teh Poh Teik, who was not counsel acting for the appellant at the High Court raised two issues, firstly a doubt on the identity of the exhibits and secondly failure by the learned trial judge to draw inferences favourable to the appellant. We shall deal with the first issue first. The argument is premised on counsel's contention that the appellant might have been wrongfully convicted of the fifth charge in respect of which neither the appellant nor the Public Prosecutor filed any appeal. The fifth charge was as follows:

> Bahawa kamu bersama-sama pada 18.6.2008 jam lebih kurang 10.30 malam, bertempat di alamat 260D, Leboh Carnarvon, Georgetown, di dalam Daerah Timur Laut, di dalam negeri Pulau Pinang, dengan niat bersama memiliki dadah berbahaya jenis Cannabis seberat 53.17 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

[20] It was submitted that the charge was baseless as there was no evidence of any seizure by the police of vegetable material suspected to be cannabis. In fact what the chemist found in the bottle marked 6F-21 was "CECAIR DISYAKI BAHAN ASID". Both the search list and the police report also did not mention any recovery or seizure of vegetable material. There was no explanation by the prosecution as to how the 'CECAIR DISYAKI BAHAN ASID' came to be found to be cannabis.

[21] It was contended that this infirmity in the prosecution case has thrown doubts on the integrity of the chemist evidence and the appellant could have been convicted of an offence which he did not commit. The analogy is that since it was the same chemist who analysed the drugs confiscated from the premises, there could also be a doubt on the identity of the drug exhibits produced in the present case under appeal. We understand this to mean that since the manner in which the evidence that was built up in respect of the fifth charge is questionable, the integrity of the exhibits in the present case under appeal must also be questionable. It was urged upon us to exercise our inherent jurisdiction to set aside the appellant's conviction on the fifth charge.

[22] Without delving into the merits of the submission, we declined to accede to learned counsel's request firstly because there was no appeal against the conviction in respect of the fifth charge and secondly to allow such application would be to set a dangerous precedent. It will potentially open the floodgates for similar application in the future whereby an appellant could just collaterally attack the trial judge's decision without going through the prescribed appeal process.

[23] Thus, although we were seized with jurisdiction to make the order sought, we did not find this to be a fit and proper case for the exercise of such discretionary power. Furthermore it was unfair to the prosecution as the learned DPP was taken by surprise as he was only made aware of the matter on the hearing date itself.

[24] This brings us to the second issue, which is whether the learned trial judge failed to draw inferences favourable to the appellant. It was submitted that the learned trial judge was wrong in drawing the inference that the premise was used for manufacturing and that the appellant was engaged in processing drugs. It was pointed out that the learned trial judge had fallen into serious error in making such finding as it contradicted his own finding in his earlier judgment that the appellant was not engaged in the act of processing or manufacturing.

[25] With due respect to learned counsel, the point raised is a non issue as the learned trial judge's finding in his earlier judgment had by necessary implication been set aside by the Court of Appeal when it allowed the Public Prosecutor's appeal. The only issue before us is whether the learned trial judge had erred in finding the appellant guilty of the offences charged.

[26] The position of the law as we understand it is that when a *prima facie* case of trafficking has been found to have been established against the accused either by the trial court or by the appellate court on appeal, the accused bears the following burden: If the presumption of trafficking under s. 37(da) of the DDA applies against him he has a legal burden to prove on the balance of probabilities that the drugs were not for the purpose of trafficking. If the presumption of trafficking does not apply but nevertheless an inference can be drawn that the drugs were for the purpose of trafficking, he still has a burden to discharge but the burden is the lower evidential burden of merely to cast a reasonable doubt in the prosecution case as to whether the drugs were for the purpose of trafficking or otherwise: *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263.

[27] Where the burden is to rebut the presumption of trafficking, the consequence of a finding that the presumption has been rebutted will be an acquittal whereas the absence of such a finding will have the consequence of a conviction: see the Privy Council decision in *PP v. Yuvaraj* [1968] 1 LNS 116; [1962] 2 MLJ 189 where Lord Diplock said:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". **In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction.**
>
> (emphasis added)

[28] The above passage was quoted with approval by the Federal Court in *Ng Eng Kooi & Anor v. PP* [1970] 1 LNS 86; [1970] 1 MLJ 267. We are mindful of the fact that *Yuvaraj* was a corruption case while *Ng Eng Kooi* was

a customs case and as such may not be analogous to drug trafficking cases but in our view the above pronouncement by Lord Diplock equally applies to drug trafficking cases as both judgments turned on the words "unless the contrary is proved". These words bear the same meaning as the words "until the contrary is proved" found in s. 37(da) of the DDA.

[29] It was with these principles in mind that we proceeded to carefully consider the learned trial judge's evaluation of the appellant's defence. Having done so we were satisfied that the learned judge had not erred in finding the appellant guilty of the offences charged. We were satisfied that there had been sufficient judicial appreciation of the evidence by the learned trial judge. In our view, any reasonable tribunal properly appraised of the facts and the principles would have arrived at the same conclusion as the learned trial judge did.

[30] Having said that we need to point out an important feature of the case. When the Court of Appeal ordered the appellant to enter his defence, the order was for him to enter his defence on three trafficking charges. He was not called upon to answer three possession charges. However, when the appellant entered his defence, the defence that he raised was the defence of no knowledge, ie, that he was not even in "possession" of the drugs as the word is understood in criminal law. Clearly trafficking and possession are two distinct offences under the DDA.

[31] The defence of no knowledge raised by the appellant is a complete defence in the sense that if established it would not only entitle him to be acquitted of the trafficking charges but will also exculpate him of the offence of possession under s. 12(2) of the DDA for without knowledge possession is not an offence. But by adopting this line of defence the appellant had chosen not to give any explanation to the chemist's testimony that the house was used as a clandestine drug processing laboratory. This must be taken to mean that the appellant had no answer to the inference drawn that the drugs were for the purpose of trafficking within the meaning of s. 2 of the DDA.

[32] The defence of no knowledge raised by the appellant is subject to the presumption under s. 37(d) of the DDA. In order to succeed he must discharge this legal burden by proving on the balance of probabilities that he had no knowledge of the drugs. The presumption clearly applied as the drugs were found in the appellant's custody and under his control. He is therefore deemed to have known the nature of the drugs. For ease of reference we reproduce below s. 37(d):

> In all proceedings under this Act or any regulation thereunder:
>
> (d) any person who is found to have in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to **have been in possession** of such drug and shall, until the contrary is proved, be **deemed to have known the nature** of such drug.
>
> (emphasis added)

[33] It is to be noted that there are two limbs to the provision, the first being a presumption of 'possession' and the other a presumption of knowledge as to the nature of the drug. It is the second limb that we are concerned with. By the terms of the second limb, knowledge is presumed to exist "until the contrary is proved", which means until and unless the accused discharges his burden of proof, the court must act on the basis that he knew about the drugs. Thus, to entitle the appellant to the benefit of the defence it is not enough for the appellant to merely raise a reasonable doubt as to whether he had knowledge of the drugs or otherwise. The law required him to prove to the contrary. He must as a matter of law prove to the contrary on the balance of probabilities. The presumption does not cease to operate just because there is affirmative evidence of knowledge against him and thus entitling him to take advantage of the lower burden of merely raising a reasonable doubt in the prosecution case instead of the higher burden of proving his defence on the balance of probabilities.

[34] It is the duty of the court to invoke and give effect to the presumption under s. 37(d) of the DDA even where there is evidence from which to draw the inference of knowledge. Parliament in its wisdom has deemed it fit to presume knowledge once custody or control of any dangerous drug has been established. To omit invoking the presumption would be to ignore the intention of the Legislature. It will give the impression that Parliament had legislated in vain, which it does not. The court's obligation to invoke the presumption was emphasised by the Federal Court in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 where Chong Siew Fai CJ (Sabah and Sarawak) delivering the judgment of the court said at p. 190:

> The 'deemed' state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under s. 37(d) (and for that matter, the one under s. 37(da)) are sometimes described as "compelling presumptions" in that *upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves to the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make.*
>
> (emphasis added)

[35] The decision in the above case which binds this court and the court below was followed in the Federal Court case of *PP v. Zulkifli Arshad* [2010] 6 CLJ 121. It is important to appreciate the distinction between the legal burden to prove a defence on the balance of probabilities and the evidential burden to merely cast a reasonable doubt in the prosecution case. To apply the wrong burden either way can give rise to a serious miscarriage of justice.

[36] The decision in *Muhammed Hassan* must not be understood to mean that where there is affirmative evidence of possession to invoke the presumption of trafficking under s. 37(da), the prosecution is barred from invoking the presumption of knowledge under s. 37(d). These two presumptions apply independently of each other as they relate to different elements of the offence. What is presumed by s. 37(da) is the element of trafficking whereas s. 37(d) presumes the element of knowledge. While the presumption of trafficking is triggered by evidence of possession, the presumption of knowledge kicks in by proof of custody or control.

[37] Thus whether "trafficking" is presumed by s. 37(da) or inferred by reference to s. 2 of the DDA the presumption of knowledge under s. 37(d) remains applicable. Either way the burden of proving the defence of no knowledge (if raised) remains with the accused.

[38] In the present case the learned trial judge applied the reasonable doubt test throughout in dealing with the appellant's defence of no knowledge. This is erroneous but since the misdirection was favourable to the appellant it has no bearing on the outcome of the case. If the appellant could not succeed on the lower burden, there is no question that he could succeed on a higher burden.

[39] We should perhaps quote what Azmi LP delivering the judgment of the Federal Court in *Ng Eng Kooi* (*supra*) had to say on this distinction in law:

> It was next submitted by Dato' Marshall that the quantum of proof indicated by Their Lordships of the Privy Council is incongruous in that it gives a higher status to a presumption of law than to actual facts. By way of example, he said that if the police search a person and find with him a tobacco pouch with tobacco in it, they can charge him for being in possession of uncustomed goods and the onus is on him under section 131(2) of the Ordinance to prove on the balance of probabilities that duty has been paid on the tobacco or that he does not know that duty has not been paid, whereas if a person is charged with far graver crimes such as treason, murder or fraud, all that he has to do is to raise a reasonable doubt in the prosecution case. He further said that the said quantum of proof has now introduced in this country two different measures of quantum of proof on an accused person at the close of the prosecution case, which if unrebutted, must result in a conviction, namely:
>
> (a) to raise a reasonable doubt where the prosecution case is made out of facts and legitimate inferences therefrom; and,
>
> (b) to prove on a balance of probabilities where a statutory presumption is raised against him "unless the contrary is proved.
>
> This distinction in the quantum of proof, he submitted, seems to be contrary to elementary common sense and unnecessary.
>
> With great respect to Dato' Marshall, that distinction in the quantum of proof has always been there, and law is not always or solely a matter of elementary common sense.

[40] And in answer to Dato' Marshall's suggestion in the same case that to follow the test laid down by *Yuvaraj* (*supra*) would cast on the defence a heavier burden than having to merely raise a reasonable doubt in the prosecution case, Azmi LP reproduced what Lord Diplock said at p. 92 as follows:

> It has been suggested that to satisfy the court that upon the balance of probabilities a fact does not exist puts too high a burden upon a defendant in criminal proceedings where the consequences of a failure to disprove that fact would be his conviction; and in some of the cases cited by the Federal Court without explicit disapproval expressions are used which might be understood as calling for an explanation by the defendant of no greater plausibility than is sufficient to raise a reasonable doubt in the existence of the fact which he must disprove. But this is the test by which in the absence of any statutory provision reversing the burden of proof the court determines whether a fact the existence of which is a necessary ingredient of a criminal offence has been 'proved' or 'not proved' by the prosecution upon whom the onus lies to prove it. It is merely another way of saying that the prosecution must not only prove the first two factual ingredients of the offence, *viz*, (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift, or receipt he was in the employment of the public body, but must also satisfy the court that the circumstances in which the gratification was paid, given or received give rise beyond reasonable doubt to an inference of fact that it was paid, given or received with a corrupt motive. This is the ordinary way in which the prosecution satisfies the burden of proving the motive with which an act was done by the defendant where the onus of doing so lies upon the prosecution. *In Their Lordships' view it gives no sufficient effect to the reversal of the ordinary onus of proof by an express statutory provision that a fact which constitutes an ingredient of a criminal offence shall be deemed to exist 'unless the contrary is proved'*.
>
> (emphasis added)

[41] Thus, where the accused has a legal (and not merely evidential) burden to discharge, he does not discharge that burden by merely raising a reasonable doubt on the fact that is presumed by law, in this case knowledge of the nature of the drugs. He must prove absence of knowledge on the balance of probabilities by admissible evidence. In the absence of such rebuttal evidence coming from the accused, there will be no material before the court for the trial judge to come to a finding that the fact presumed has been rebutted.

[42] The question therefore is whether the appellant had rebutted the presumption of knowledge under s. 37(d) of the DDA. A careful examination of his defence will reveal that it is a mere denial more than anything else. The learned trial judge had clearly and in our view rightly rejected the appellant's claim that he had no knowledge of the drugs. His explanation was obviously tailored to counter every material aspect of the prosecution's evidence. When the prosecution's evidence was that he ran away when SP3 confronted him, he said this was a lie. The truth according to him is that it

was the police themselves who brought him into the house through the side door. When the prosecution's evidence was that he locked the door after running into the house, he said the door was not locked. He denied SP3's evidence that the police had to kick open the door. He went on to say that the police only identified themselves after his arrest and not before.

[43] When the prosecution evidence was that he was present when the drugs and drug related utensils were discovered in the house, the appellant countered by saying that he was not present. He also refuted SP3's evidence that a bunch of keys was found inside his right trousers pocket. According to him the keys were found on a table in one of the rooms inside the house. It appears that about the only thing he did not dispute is the fact that he was not wearing any shirt.

[44] He testified that after the police took the keys he could not remember what happened. The only thing he could remember according to him was being handcuffed. Nevertheless, despite this sudden loss of memory the appellant went on to say that he was then brought to the kitchen where he saw the other two accused being detained.

[45] The rest of his evidence was intended to give the impression that the drugs seized were already in the house before he rented it from one Neoh Thiam Chuan and that he had no knowledge of the drugs, nor did he know who put the drugs there or how long the drugs had been there. These are questions for the trial court to consider whether to accept or to reject. As for his wife's (SD2) testimony, the only material part of her evidence if at all is that she had seen five to six people in the house. However she did not know any of them.

[46] On the issue of knowledge, we bear in mind that the Court of Appeal, in finding that a *prima facie* case of trafficking had been established against the appellant must have found that the witnesses called by the prosecution were credible witnesses. This can only mean that knowledge had been proved against the appellant as their evidence, in particular SP3's evidence point to guilty conduct on the part of the appellant. We can safely say that the Court of Appeal would not have called for the defence if there was a doubt on the credibility of the prosecution witnesses. More importantly as discussed earlier it is not for the prosecution to prove knowledge as it is presumed.

[47] As a matter of fact the acquittal of the appellant by the High Court was not because the learned trial judge did not believe the prosecution witnesses. His initial decision to acquit the appellant of the trafficking charges was based on an entirely different ground, ie, that there was no evidence that the appellant was involved in manufacturing and processing drug. Indeed at p. 112 of the judgment (p. 135 of the record of appeal vol. 1) the learned trial judge made it clear that he accepted the evidence of SP3 and SP7 as being credible and reliable.

[48] Since the appellant's defence of no knowledge (which is purely a question of fact) was rejected by the learned trial judge, *albeit* on the lower burden of raising a reasonable doubt, it must follow that the trafficking charges had been proved beyond reasonable doubt. Failure to rebut the presumption of knowledge must lead to a conviction as it left the appellant with no other defence to fall back on in rebuttal of the *prima facie* case of trafficking established against him at the close of the prosecution case.

[49] In this regard what s. 180(4) of the Criminal Procedure Code provides gives some idea as to what the accused is required to do when his defence is called:

> For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which **if unrebutted or unexplained** would warrant a conviction.
>
> (emphasis added)

[50] As a postscript we need to mention that the rule against double presumption as decided by *Muhammed Hassan* has been overruled by an amendment to the DDA in the form of s. 37A(1) which took effect on 15 February 2014 *vide* Amendment Act A1457. It provides as follows:

> 37A. Application of presumptions
>
> (1) Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law.

[51] With this amendment, the presumption of knowledge under s. 37(d) can now be invoked to presume trafficking under s. 37(da). The amendment however does not affect that part of the decision in *Muhammed Hassan* which decided that the court must invoke the presumption of knowledge under s. 37(d) once custody or control is established.

[52] For reasons aforesaid we found no merit in the appellant's appeal and we therefore dismissed the appeal and affirmed the conviction and sentence.